Myanma Yaung Chi Oo Co. Ltd v Win Win Nu and Another
[2003] SGHC 124

Case Number : Suit 1357/2002, RA 115/2003

Decision Date : 06 June 2003

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Anjali Iyer (Haq & Selvam) for the Plaintiffs; Ow Kim Kit (Haq & Selvam) for the Plaintiffs; Mohan Das (Haq & Selvam) for the Plaintiffs; Chelva R Rajah SC (Tan Rajah & Cheah) for the Defendants; Burton Chen (Tan Rajah & Cheah) for the Defendants; MK Eusuff Ali (Tan Rajah & Cheah) for the Defendants; Christine Lee (Tan Rajah & Cheah) for the Defendants

Parties : Myanma Yaung Chi Oo Co. Ltd — Win Win Nu; Yaung Chi Oo Trading Pte Ltd

Arbitration – Confidentiality – Documents – Documents from arbitration proceedings used in court – Reasonable necessity exception – Whether leave of court necessary – Whether leave of court can be granted retrospectively

Arbitration – Confidentiality – Documents – Documents from arbitration proceedings used in court – Whether parties owe duty to maintain confidentiality of documents used in arbitration proceedings

1 The parties in this action are involved in legal proceedings in Singapore and in Myanmar.

2 The proceedings arose out of a joint venture between the first defendant and Myanmar Foodstuff Industries ("MFI"), an organization under the control of the government of Myanmar, and the establishment of a joint venture company, the plaintiff. The company started off well, but disagreements between joint venture parties eventually led to the winding up of the company.

3 The second defendant commenced arbitration proceedings against the government of Myanmar under the Agreement for the Promotion and Protection of Investments between member governments of the Association of South East Asian Nations on the ground that the government wrongfully expropriated its investment in the plaintiff company.

4 Subsequent to the filing of these proceedings, actions were filed against the first defendant in Myanmar, one by the liquidators of the company and one by MFI. In addition to that, the present action was filed in Singapore in the name of the company.

5 The defendants applied to strike out the action on the ground that it is scandalous, frivolous or vexatious or is an abuse of the process of court. They sought in the alternative to have the action stayed pending the determination of the arbitration proceedings. The first defendant deposed affidavits in support of the application where she referred to the arbitration proceedings and exhibited documents in those proceedings. The plaintiff objected to the disclosures and applied to strike them out. After hearing counsel, an assistant registrar made the orders the plaintiff sought, and the defendants appealed against the orders.

6 The plaintiff's application was made on the basis that the disclosures are irrelevant, scandalous, oppressive and inadmissible, that they are intended to abuse or prejudice the plaintiffs, that they are unduly prolific, that they are intended as a contemptuous, defamatory and collateral attack on the organs of the government of Myanmar and are in breach of the rule of comity of nations.

7 When the matter came before the assistant registrar, the issues had narrowed. The assistant registrar noted that

> One of the main issues in contention is whether prior leave is required before an arbitrating party can rely on the "reasonable necessity" exception. *Hassneh* suggests that the duty of confidentiality, akin to the duty found between banker and customer, is limited and disclosure of the award on the ground of reasonable necessity does not require leave of court. However, *Ali Shipping* suggests that leave is nevertheless required if one seeks to rely on this exception even though reference was made to *Hassneh* and the banker-customer relationship analogy.
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> Based on *Ali Shipping* and submissions made by Plaintiff Counsel, I am of the view that prior leave is required. Assuming that the court can grant retrospective leave, the Defendants have not given me any reason to do so except that they had held the view that leave of court was not required in the first place. That would not be sufficient. I would add that the legal position is not crystal clear and it is understandable why Defendants took the position they did.

(The two cases are referred to in paras 12-15).

8 On appeal before me, the issues were refined further to whether parties in arbitration proceedings have a duty to maintain confidentiality of the documents in those proceeding, and whether leave of court was necessary for a party to disclose such documents and if so, if it could be given retrospectively.

9 The general position is set out in *Russell on Arbitration* (22nd edn) which states at para 5-197

> Whilst it is clear that under English law the general principles of confidentiality and privacy apply to arbitration, there is no reason to be complacent, or to regard the current position as beyond question, particularly in the light of decisions such as *Esso/BHP v Plowman*. In that case the High Court of Australia reviewed the English authorities on the subject in detail with substantial input from leading English lawyers, yet concluded that under Australian law there was no implied obligation of confidentiality.

It goes on at para 5-198 that

> The private nature of arbitration gives rise to an implied obligation on a party obtaining documents in an arbitration not to disclose or use them for any purpose other than the dispute in which they were obtained. This duty of confidence extends to "any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award". There are exceptions to this duty of non-disclosure where the disclosure takes place with the consent of the other party or by order or leave of the court, where it is reasonably necessary or where it is in the interests of justice.

and at para 5-200 that

> The duty of confidence is qualified in relation to the award when disclosure is reasonably necessary to establish or protect a party's legal rights as against a third party by founding a cause of action or a defence to a claim. In these circumstances disclosure of the award, including any reasons given, will not be a breach of the duty of confidentiality. It was previously thought that this principle applied only to an award and not to materials such as pleadings, witness statements, disclosure, etc., used in the arbitration process leading up to the award. However, recent authority suggests it also covers pleadings, written submissions, proofs of witnesses, transcripts and notes of the evidence, provided of course such disclosure is reasonably necessary to establish or protect a party's legal rights as against a third party.

10 The duty of confidentiality was discussed in *Dolling-Baker v Merrett* [1990] 1 WLR 1205 where Parker LJ stated at p 1213

> As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must, in my judgment, be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and indeed not to disclose in any other way what evidence had been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court. That qualification is necessary, just as it is in the case of the implied obligation of secrecy between banker and customer.
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> It will be appreciated that I do not intend in the foregoing to give a precise definition of the extent of the obligation. It is unnecessary to do so in the present case. It must be perfectly apparent that, for example, the fact that a document is used in an arbitration does not confer on it any confidentiality or privilege which can be availed of in subsequent proceedings. If it is a relevant document, its relevance remains. But that the obligation exists in some form appears to me to be abundantly apparent. It is not a question of immunity or public interest. it is a question of an implied obligation arising out of the nature of arbitration itself.

11 This implied obligation, because it is implied, should reflect the needs and expectations of the parties.

12 In *Hassneh Insurance Co of Israel v Mew* [1993] 2 Ll LR 243 Colman J held that it was not a breach of the duty of confidence for an arbitrating party to make disclosure of an arbitration award including its reasons if it is reasonably necessary for the party to do so to establish or protect its legal rights against a third party, but the judge drew the line against the disclosure of the "raw materials" for the determination such the notes of evidence, witness statements, outline submissions and pleadings.

13 In regard to the award and the reasons, Colman J held at pp 247-8

> … First, an award is an identification of the parties' respective rights and obligations and secondly it is at least potentially a public document for the purposes of supervision by the Courts or enforcement in them.
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> It follows, in my judgment, that any definition of the scope of the duty of confidence which attaches to an arbitration award – and I include the reasons – which omitted to take account of such significant characteristics would be defective. Since the duty of confidence must be based on an implied term of the agreement to arbitrate, that term must have regard to the purposes for which awards may be expected to be used in the ordinary course of commerce and in the ordinary application of English arbitration law.
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> … (T)he arbitrating party may require for the purposes of establishing his legal rights against the third party to produce the award against him to that third party. The suggestion by an officious bystander of a duty of confidentiality which precluded the use of arbitration awards for the establishment by arbitrating parties of their rights against third parties, unless the leave of a Court were first obtained, would be unlikely to be enthusiastically received by the commercial community.

14 The Court of Appeal in *Ali Shipping Corporation v Shipyard Trogir* [1999] 1 WLR 314 adopted a broader stance. Potter LJ in delivering the judgment of the Court, referred to *Hassneh* and stated at p 326 "I consider that the implied term ought properly to be regarded as attaching as a matter of law." and observed that

Although to date this exception has been held applicable only to disclosure of an award, it is clear, and indeed the parties do not dispute, that the principle covers also pleadings, written submissions, and the proofs of witnesses as well as transcripts and notes of the evidence given in the arbitration.

15 He went on to state at pp 326-7 that disclosure is permissible with the

(i) consent of the parties, express or implied

(ii) order of court

(iii) leave of court, or

(iv) when it is reasonably necessary for the protection of the legitimate interest of an arbitrating party.

16 The Australian High Court does not find that a duty of confidence is implied and imposed on the parties. In *Esso Australia Resources Ltd v Plowman* [1995] 128 ALR 391 @ 401 Mason CJ declined to follow *Dolling-Baker* and *Hassneh*, because

I do not consider that, in Australia, having regard to the various matters to which I have referred, we are justified in concluding that confidentiality is an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration.

17 The first issue that is to be resolved is whether there is an implied duty of confidentiality. I prefer the English position over the Australian. Parties who opt for arbitration rather than litigation are likely to be aware of and be influenced by the fact that the former are private hearings while the latter are open hearings. Rather than to say that there is nothing inherently confidential in the arbitration process, it is more in keeping with the parties' expectations to take the position that the proceedings are confidential, and that disclosures can be made in the accepted circumstances.

18 The next question is whether a party which contends that the disclosure of the arbitration proceedings is necessary has to obtain the leave of court before making the disclosure.

19 I do not think it is. The reasonable necessity exception is grounded on the implied agreement that when it is reasonably necessary to disclose the duty of confidentiality is lifted. If the duty does not apply leave of court is not required for disclosure.

20 Of course it is not for that party alone to decide whether the disclosure is reasonably necessary. If another party disputes the necessity, it can apply to expunge the disclosure and the court will then determine if it is reasonably necessary, and make an order to expunge if it is not.

21 The assistant registrar held that prior leave was necessary. She also found that the defendants had not offered any reasons for her to grant retrospective leave. As I have stated I do not think that leave, prior or retrospective, is necessary, but any disclosure may be expunged if it is found not to be reasonably necessary.

22 The defendants assert that disclosure is necessary to establish that the Singapore action is vexatious, oppressive and an abuse of the process of court. They alleged that the same allegations of wrongdoing have been made against the first defendant in two pending actions before the courts of Myanmar where she is the defendant, as well as the arbitration proceedings. They have applied to stay the action pending the completion of the arbitration proceedings on that basis.

23 At that time when that application was filed, the disclosure of the arbitration pleadings and documents was justified because the disclosure was necessary to support the contention that the action is vexatious and an abuse of court. Indeed it would be difficult for the issue to be determined without the disclosure. The assistant registrar should have ruled that the disclosure was reasonably necessary.

24 However between the time of her decision and the appeal coming on before me the position changed. The arbitration tribunal has held that it had no jurisdiction to hear the matter. By that decision, the arbitration proceedings were brought to an end. Any assertion of oppression or duplicity in the actions must be confined to the two court actions in Myanmar. If the arbitration proceedings were part of the oppression they have ceased to be that, and the disclosure is no longer necessary.

25 In the circumstances, I affirm the assistant registrar's order although I think that she should not have made it when she heard the application. For that reason, I order that the costs awarded by her to the plaintiff be set aside. For the appeal, as the defendants have succeeded on the legal issues but failed on the facts, I order that each party bears it own costs.

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